

***United States Court of Appeals
for the Second Circuit***



**APPELLEE'S
SUPPLEMENTAL
BRIEF**

77-1099

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mailing*

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 77-1099

*B
PSS*

UNITED STATES OF AMERICA,

Appellee,

- against -

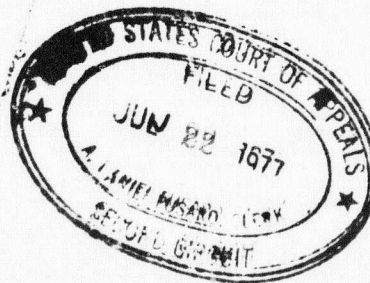
PHILIP W. ROSATI,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

SUPPLEMENTAL APPELLEE'S BRIEF

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.



INTRODUCTION

By a "Supplementary Brief", appellant Rcsati does not further contest his judgment of conviction or the sentence imposed, but seeks "either a de novo sentence proceeding or an order directing the Probation Department to withdraw its previous pre-sentence report and forward a superseding report to the Bureau of Prisons and the Parole Commission in which the portions challenged herein have been excused, and directing those bodies to consider only the superseding report" (App. Supp. Br., at p.11). The argument apparently is that alleged inaccuracies in the presentence report, items which the district court expressly disclaimed reliance upon at sentencing, may be raised on appeal and, for the first time sought to be expunged or the report superseded, in order to prevent some future speculative harm although there is no challenge to the sentence itself.

We contend that such a claim, for relief not sought below, is not cognizable on this direct criminal appeal. The proper remedy we submit, is to seek such relief by appropriate motion in the district court. Additionally, the appellant by simply providing to the Bureau of Prisons or Parole Commission the sentencing transcript, wherein the court indicated that it was ignoring the claimed inaccuracies, would achieve the desired

result. Finally, there exists an administrative procedure for him to rebut inaccuracies in the presentence report before it is used by the Parole Commission.

FACTUAL STATEMENT

On February 18, 1977, Rosati appeared before Judge Neaher for sentencing.^{1/} Counsel indicated to the court that both he and appellant had read the presentence report prior to the day of sentencing and that the report contained several errors. First, appellant challenged the statement, attributed to Drug Enforcement Administration agents, that "Rosati was a mule at some point in time for a heroin ring"

^{1/} David Rudolph, Esq., who had represented Rosati while a member of the Legal Aid Society, appeared at sentencing, although he was then no longer with the Society. (Tr. Sentencing, p. 3; all references hereinafter are to the Sentencing Minutes).

(9). ^{2/} Next, it was contended that it was improper for the report to have stated that appellant had refused to cooperate with the Government (11). ^{3/} Finally, counsel challenged the conclusion that Rosati had an unverifiable work history (13) ^{4/}

Following short colloquy, during which the prosecutor set forth the basis for the belief that Rosati was involved with heroin (16-17), the court stated it was

^{2/} The full statement, set forth in the presentence report is as follows:

"Agents indicate that on the basis of their investigation they believe that Rosati acted as a type of 'mule' for a well organized heroin ring during previous trips abroad. Agents advise that Rosati could not be charged for his participation in this smuggling ring because of a lack of concrete evidence (Presentence Report, p.5 [hereinafter, "Report"])).

^{3/} According to the report:

Agents indicate that Rosati has refused to cooperate and they add that his knowledge of drug trafficking would have been of substantial circumstance in continuing investigations of drug trafficking and smuggling from abroad (Report, pp. 5-6).

^{4/} According to the report:

"His work record for the first part is unverifiable, especially his alleged employment while overseas" (Report, P. 19)".

disregarding the challenged items in the report^{5/} Judge Neaher said:

"[I]n my opinion what was developed during the trial and without regard to the trial items that your counsel brought to the Court's attention by way of criticism, certain comments in the presentence report, I am not focusing on these at all, I am focusing on what I know about this case from having presided on the trial (19, emphasis added).

Sentence was thereafter imposed.

There was no motion to strike the challenged portion from the report or to have the Probation authorities prepare a superseding report. Moreover, to date, no such motion has been made in the district court.

^{5/} We briefly note that the claim regarding the lack of cooperation was not that it was inaccurate but that it was "Alice in Wonderland" since Rosati continued to maintain his innocence. (11). Concerning the overseas work history, the claim was that the accomplice testimony would corroborate this. Beyond the interesting point that, as to this item, the accomplice testimony was stated to be truthful, examination of the testimony shows that the accomplice merely testified that he knew that Rosati had brought oriental carpets back to the United States and had tried to sell them (302-306). This is hardly verification of employment.

ARGUMENT

THE JUDGMENT OF CONVICTION
SHOULD BE AFFIRMED: NEITHER
DE NOVO SENTENCING NOR DIRECT⁶ION
TO PROBATION CONCERNING THE
PRESENTENCE REPORT IS PROPER
OR WARRANTED.

The short answer to this point is that since there was simply no ruling of the trial court with respect to the presentence report, there is nothing to be reviewed on this appeal. Hence, the request must be denied. Because this is a direct appeal from a criminal conviction the appeal, we submit, must attack the judgment itself - not some future use which may be made of the presentence report which was prepared as an incident to the criminal case.^{6/}

Of course, since the district court disclaimed any reliance on these contested portions of the presentence report, the sentence itself is beyond attack on appeal. See United States v. Driscoll, 496 F.2d 252, 253 (2d Cir. 1974). In apparent recognition of the rule that resentencing is required only where the court relied on misinformation or untrue information, e.g., United States v. Malcolm, 432 F.2d 809, 816 (2d Cir. 1970), appellant ingeniously seeks a de novo sentence proceeding - whatever that may be. But, since the sentence was not improperly imposed, see e.g. United States

^{6/} If this was the only point on appeal, the proper disposition of the case would be, we submit, dismissal of the appeal since there is no predicate ruling presented for review.

v. Robin, 545 F.2d 775 (2d Cir. 1976), and United States v. Rosner, 485 F.2d 1213, 1230-1231 (2d Cir. 1973) cert. denied, 417 U.S. 950 (1974), there is no basis for further direction to the district court with respect to sentencing. A fortiori, there is no basis for further direction with respect to the presentence report.

Moreover, we contend that this entire argument is, in effect moot, since the court below expressly disclaimed reliance on the alleged inaccuracies. Thus, the transcript of the sentencing proceedings, if forwarded to the Bureau of Prisons and the Parole Commission will accomplish what is desired by appellant.^{7/} Or, as this Court put it in United States v. Brown, 479 F.2d 1170, 1173 (2d Cir. 1973), in a related context:

"[T]he court['s statement] could prove to be of considerable assistance to prison and parole authorities in later determining the type of institution in which the defendant should be incarcerated and the time and conditions of parole."

Indeed, the sentencing minutes contain a statement of the court's reasons for imposing the sentence (18-20), although such reasons are not required by law to be set forth, United States v. Seijo, 537 F.2d 694, 699 (2d Cir. 1976).

^{7/} According to James Meko, Correctional Program Specialist, U.S. Bureau of Prisons, Washington, D.C., if furnished a certified copy of the sentencing minutes with reference to the pertinent portions thereof, the Bureau of Prisons, will not consider the portions disregarded by the court.

But even assuming that appellant, for whatever reason,^{8/} does not chose to forward the minutes to the Bureau of Prisons and Parole Commission, the prejudice, if any, we submit is imagined and otherwise administratively curable.

With regard to institutional designation, for Youth Offenders, the alleged offense information, e.g., that appellant had been involved in heroin smuggling, is not a relevant factor. All Youth Offenders committed pursuant to 18 U.S.C. §5010(b) are classified "A-2" (Bureau of Prisons Policy Statement, 7300.65, dated 3-22-72, ¶5A). Such individuals are thereafter designated to one of several equivalent institutions (id at ¶4C). It is within the designated institution that the presentence report becomes a source document for custody classification (Bureau of Prisons Policy Statement, 7300.112, dated 4-8-76) and for case management and other classification purposes (Bureau of Prisons Policy Statement, 7200.17, dated 10-23-75). However, in either case, if it has received a certified copy of the sentencing minutes, the Bureau of Prisons will not consider this alleged offense.^{9/}

^{8/} It is assumed that one reason may be that the district court's disclaimer is not considered by appellant to be the equivalent of a finding of error or inaccuracy with regard to these remarks.

^{9/} See footnote 7, supra.

The presentence report, by statute, must be considered by the Parole Commission, if available, in making its determination (18 U.S.C. §4207(3); 28 C.F.R. §2.19 [July 1, 1976 Revision]). Moreover, the prisoner must be given access to this report and other documents which will be used by the Parole Commission in making its determination, subject to certain specified exceptions not relevant here since, concededly, appellant has already examined the entire report (18 U.S.C. §4208(c)). We submit that this disclosure requirement, at least with reference to the presentence report, is to meet precisely the situation here, i.e., where there is an alleged inaccuracy in the report which it is feared by the prisoner will adversely affect his chances for parole.

Thus, a federal prisoner, eligible for parole, may rebut statements in the presentence report by submitting additional information to the Commission (28 C.F.R. §2.19(b) [July 1, 1976 Revision]). Consequently, appellant, if he is able to verify employment "for a total of at least six months during the last two years in the community" will receive 1 point towards his Salient Factor Score (28 C.F.R. §2.20, esp. p. 76). Accordingly, the Salient Factor Score, if incorrectly calculated, can be corrected by the submission, of rebuttal evidence before or at the parole hearing. So, too, with respect to the offense

characteristics. If the severity of the offense is disputed, the prisoner, in advance or at the time of his hearing can submit whatever information he deems necessary to rebut this determination.

Moreover, if the Commission's reasons are without basis in the institutional record, judicial remedies may then be available. Cf. Fisher v. United States, 382 F. Supp. 241 (D. Conn. 1974); Lupo v. Norton, 371 F. Supp. 156 (D. Conn. 1974). Since there are appropriate administrative procedures available, together with further judicial remedies, and since the claimed prejudicial effect of the use by the Commission of this allegedly erroneous information is in futuro, the request for de novo resentencing or direction to the Probation authorities should be denied.

CONCLUSION

For the foregoing reasons, the judgment of conviction should be affirmed. There should be neither a de novo sentencing nor any direction to Probation concerning the presentence report.

Dated: Brooklyn, New York
June 21, 1977

Respectfully submitted,

DAVID G. TRAGER
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Eastern District of New York

BERNARD J. FRIED
Assistant U.S. Attorney
(Of Counsel)

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

_____ Kelvin Outlaw _____ being duly sworn,
deposes and says that he is employed in the office of _____ U.S. Attorney
_____ United States Attorney for
the Eastern District of New York, attorney for the _____ Appellee
herein.

That on the _____ 21st _____ day of _____ June _____ 19 77, he did serve a true copy of
the hereto annexed _____ Supplemental Appellee's Brief

_____ on the office of _____ Legal Aid Society
attorney for the _____ Appellant _____ herein, located at 509 U.S. Courthouse

_____ Borough of _____ New York _____, City of New York, by leaving a true copy of the same with
the person in charge of said office, there being no one present who was authorized to give an admis-
sion of service.

Kelvin Outlaw

Sworn to before me this

21 day of *June* 19 *77*
Barbara A. Allen

BARBARA A. ALLEN
Notary Public, State of New York
No. 24-4646824
Qualified in Kings County
Commission Expires March 30, 1979